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149

5-95900
sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1

R. SIMPSON & CO., INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1942.

CERTIORARI GRANTED JUNE 7, 1943.

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Docket Entries.

R. SIMPSON & Co., INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET No. 98208

Appearances:

For Taxpayer: FRANCIS F. STEVENS, Esq., GERALD DONOVAN, Esq.

For Comm'r: CONWAY KITCHEN, Esq.

1939

Apr. 26 — Petition received and filed. Taxpayer notified.
(Fee paid.)

Apr. 26 — Copy of petition served on General Counsel.

Apr. 26 — Request for circuit hearing in New York City
filed by taxpayer. 4/26/39 copy served.

June 1 — Answer filed by General Counsel.

June 10 — Copy of answer served on taxpayer, New York
Calendar.

1940

May 20 — Hearing set June 24, 1940 in New York, N. Y.

June 18 — Motion for postponement of hearing until the
middle of September, 1940 filed by taxpayer.
6/21/40 granted to Fall New York Calendar.

Oct. 2 — Hearing set Nov. 18, 1940 in New York City.

Nov. 9 — Motion for continuance to Dec. 9, 1940, New
York City, filed by taxpayer. (Affidavit at-
tached.) 11/18/40 granted. 11/12/40 copy
served.

Docket Entries

- Nov. 9 — Motion of motion served on General Counsel.
- Nov. 15 — Notice of appearance of Francis F. Stevens as counsel for taxpayer filed.
- Nov. 23 — Notice of appearance of Gerald Donovan as counsel for taxpayer filed.
- Nov. 18 — Hearing had before Mr. Leech on motion of petitioner to continue to the New York City Calendar of 12/9/40, showing 'good cause, granted.
- Nov. 29 — Hearing set Dec. 9, 1940 in New York City.
- Dec. 9-10-13 Hearing had before Mr. Oppen on merits. Submitted. Briefs due 1/25/41; Replies 2/10/41.
- Dec. 19 — Transcript of hearing 12/9 & 10/40 filed.
- Dec. 26 — Transcript of hearing 12/13/40 filed.

1941

- Jan. 24 — Brief filed by General Counsel.
- Jan. 25 — Brief filed by taxpayer. 1/27/41 copy served on General Counsel.
- Feb. 10 — Reply brief filed by taxpayer.
- May 14 — Findings of fact and opinion rendered, Oppen, Div. 14. Decision will be entered for the respondent. Copy served 5/17/41.
- May 20 — Decision entered, Oppen, Div. 14.
- Aug. 18 — Stipulation of venue filed.
- Aug. 18 — Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
- Aug. 22 — Proof of service filed.
- Oct. 15 — Praecipe for record filed by taxpayer, with proof of service thereon.
- Oct. 17 — Order enlarging time to Nov. 8, 1941 to transmit and deliver the record, entered.

Petition.**UNITED STATES BOARD OF TAX APPEALS****R. SIMPSON & Co., Inc.,***Petitioner,**against***COMMISSIONER OF INTERNAL REVENUE,***Respondent.***DOCKET No.
98208**

2 The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (I.T.R:A:3:4) dated January 31, 1939, and as a basis of this proceeding alleges as follows:

1. The petitioner is a corporation organized to do a pawnbroking business under the Laws of the State of New York on July 1st, 1918, with its principal place of business at No. 143 West 42nd Street, New York, N. Y. It is a direct successor to a business organization established in New York in 1827.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") is dated January 31st, 1939, and was mailed to petitioner on or about that date.

3. The taxes in controversy purport to be surtaxes and penalties on a personal holding corporation for the calendar years and in the amounts as follows:

<i>Year</i>	<i>Deficiency</i>	<i>Penalty</i>
1934	\$19,563.02	\$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99
	<hr/> \$51,650.06	<hr/> \$12,912.52

Petition

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) That petitioner is alleged to be a personal holding corporation as specified in section 351 (b) (1) (A) and (B) (C) (D) and (E) and is subject to taxation imposed at the rates set forth in section 351 (a) of the Revenue Acts of 1934 and 1936;

(b) And having failed to file personal holding company returns form 1120H, within the time prescribed by law, twenty-five per centum (25%) of the tax has been added in accordance with the provisions of section 291 of the Revenue Acts of 1934 and 1936 and section 406 of the Revenue Act of 1935.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner was incorporated under the Laws of the State of New York July 1st, 1918—*sixteen years before* the enactment of the Revenue Act of 1934 which provides for taxing of personal holding corporations as such.

(b) The petitioner is now and has been conducting a definite and recognized business, its operations being specifically controlled by Laws of the State of New York, the City of New York, and political sub-divisions thereof.

(c) Petitioner is required to daily report to the Police Department of the City of New York giving a complete description of each article pledged, the sex of pledgor, amount of loan, number of loan ticket, etc. Failure to comply with the foregoing laws and regulations would necessitate the discontinuance of the business.

Petition

(d) The petitioner has more than twenty (20) employees in two (2) stores which it operates. The character of the business demands unusual experience, skill and integrity of its officers and employees in the matter of appraisals of precious stones, jewelry, platinum, gold, etc. in carrying on its business, and because of the particular experience and risk involved, it is unlikely that a corporation of this kind would have more than five (5) stockholders.

(e) The operation of petitioner's business is just as essential to public welfare as banking, as it makes available cash on certain classes of collateral not generally accepted as security, and like banking is a quasi-public business subject to particular and restrictive regulations not applicable to corporations generally or to personal holding corporations. The demand for this semi-public service is evidenced by the large amount of pledges accepted by petitioner, which were extensive enough to oblige petitioner to itself borrow funds to properly carry on its business.

(f) To subject this petitioner to surtax as a personal holding corporation is discriminatory and results in creating an inequitable hardship on a taxpayer carrying on a recognized business enterprise, because it receives its income from certain sources and because of its corporate structure, whereas other corporations carrying on businesses of other kinds are free to conduct said businesses without the hazard of being classed as personal holding companies.

(g) It was not the intent of Congress when drafting the Revenue Acts to subject to surtax as a personal holding corporation productive and operating businesses, subject to local laws and regulations as is this petitioner, but to reach

Petition

the "incorporated pocketbook" where income is received on concentrated assets and to compel the distribution of income.

(h) Even assuming, although not admitting, that petitioner was subject to surtax as a personal holding company, the assessment of penalties should be abated. The returns of petitioner for 1934, 1935 and 1936 had been regularly examined by the Treasury Department, and with the exception of some adjustments, had been approved and it was not until by letter dated March 14, 1938, (a copy of which is attached and marked exhibit "B") and after petitioner's 1937 return had been filed, that it was informed of the proposed assessment as a personal holding company. In view of the foregoing, petitioner had *reasonable cause* for not filing forms 1120H with the returns for the years in question. The Treasury Department itself was unaware and uncertain that petitioner might be subject to tax as a personal holding company.

(i) In the event that petitioner is subject to the taxes in question, objection is made to the omission of allowable deductions by the Treasury Department and the consequent error of computation of tax liability.

(j) The Department having approved in all major respects the taxpayer's returns for the years 1934, 1935 and 1936 and thereby assuring the petitioner that it had properly prepared its returns, filed all necessary returns and paid its total tax liability and therefore was not subject to further taxes, is barred from attempting to subject the petitioner to additional taxes for said years.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine that the Commissioner

Petition

has erroneously assessed a deficiency of surtax and penalties against petitioner as a personal holding company, and that said deficiencies assessed against petitioner for the calendar years 1934, 1935 and 1936 should be set aside and held for naught.

R. SIMPSON & Co., Inc.

By: R. C. Simpson

Petitioner.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

R. C. SIMPSON, being duly sworn, says that he is President of R. Simpson & Co., Inc., the petitioner above named; that he has authority to act for petitioner; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be alleged upon information and belief, and those facts he believes to be true.

R. C. SIMPSON

Subscribed and sworn to
before me this 22nd
day of April, 1939.

ERNEST L. WEILER
Notary Public

[NOTARIAL SEAL]

Petition

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Jan 31 1939

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Sirs:

You are advised that the determination of your personal holding company surtax liability for the taxable years ended December 31, 1924, 1935 and 1936, discloses a deficiency of \$51,650.06, and a penalty of \$12,912.52, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates

Petition

thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By JOHN R. KIRK
Deputy Commissioner.

Enclosures:

Statement
Form of waiver

STATEMENT

IT:R:A:3:4
GPS-90D

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Tax Liability for Taxable Years Ended
December 31, 1934, 1935 and 1936.

Personal Holding Company Surtax

<i>Year</i>	<i>Liability</i>	<i>Assessed</i>	<i>Deficiency</i>	<i>Penalty</i>
1934	\$19,563.02	None	\$19,563.02	\$ 4,890.76
1935	29,355.97	None	29,355.97	7,338.77
1936	2,731.97	None	2,731.97	682.99
Totals	\$51,650.06	None	\$51,650.06	\$12,912.52

Petition

In making this determination of your personal holding company surtax liability, careful consideration has been given to the internal revenue agent's reports dated February 29, 1936, February 26, 1937, January 3, 1938, February 18, 1938 and March 15, 1938; to your protests dated April 1, 1936 and March 25, 1938 and April 11, 1938; and to the statements made at the conferences held on May 22, 1936 and May 24, 1938.

Inasmuch as you failed to file personal holding company returns, form 1120H, within the time prescribed by law, twenty-five per centum of the tax has been added thereto in accordance with the provisions of section 291 of the Revenue Acts of 1934 and 1936 and section 406 of the Revenue Act of 1935.

Since more than eighty percent of your gross income for the taxable years ended December 31, 1934, December 31, 1935 and December 31, 1936, is derived from interest and dividends, and since more than fifty percent of the capital stock is owned by less than five stockholders, as specified in section 351(b)(1)(A) and (B)(C)(D) and (E), it is held that your corporation qualifies as a personal holding company, and is subject to taxation imposed at the rates set forth in section 351(a) of the Revenue Acts of 1934 and 1936.

A copy of this letter and enclosures has been mailed to your representative, Mr. Francis F. Stevens, 14 Wall Street, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Petition

1934

Adjustment to Net Income

Net income shown in revenue agent's report dated February 29, 1936, to which you have agreed, and which report is made a part of this letter

\$203,727.87

Net Income adjusted

\$203,727.87

Explanation of Adjustment

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted \$203,727.87

Income tax at 13 $\frac{3}{4}$ % \$ 28,012.58

Total tax liability \$ 28,012.58

Income tax assessed:

Original, account #400055 \$26,900.06

Additional, July 1936 list,

#520049 1,112.52

Total assessed

28,012.58

Deficiency of income tax

None

Computation of Surtax under section 351

Net income \$203,727.87

Less:

Federal income, war profits and excess profits taxes 20,294.02

Adjusted net income

\$183,433.85

Petition

Less:

Exemption—20%	\$36,686.77	
Dividends paid during year	\$1,537.00	
		<u>\$118,223.77</u>

Undistributed adjusted net income	\$ 65,210.08
Surtax 30%	\$ 19,563.02
Surtax previously assessed	None
Deficiency of surtax	<u>\$ 19,563.02</u>

Add:

25% of the tax as an addition for failure to file a return of personal holding company, form 1120H	<u>4,890.76</u>
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Deficiency of surtax and penalty	<u>\$ 24,453.78</u>
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1935

Adjustment to Net Income

Net income shown in revenue agent's report dated February 26, 1937, to which you have agreed, and which report is made a part of this letter	\$243,824.33
Net income adjusted	<u>\$243,824.33</u>

Explanation of Adjustment

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted	\$243,824.33
Income tax at 13 $\frac{1}{4}$ %	\$ 33,525.85
Total tax liability	<u>\$ 33,525.85</u>

Petition

Income tax assessed:

Original, account #400011	\$32,713.97
Additional, April 1937 list, #520065	811.88

Total assessed	33,525.85
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Deficiency in income tax	None
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Excess-profits Tax

Net income for excess-profits tax computation	\$243,824.33
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Less:

12½% of \$1,861,853.52, adjusted declared value of capital stock	232,731.69
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Amount subject to excess-profits tax	\$ 11,092.64
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Excess-profits tax at 5%	\$ 554.63
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Excess-profits tax assessed:

Original, account #400011	\$259.40
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Additional, April 1937 list, #520065	295.23
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Total assessed	554.63
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Deficiency in excess-profits tax	None
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Computation of Surtax under Section 351

Net income	\$243,824.33
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Less:

Federal income, war-profits and excess- profits taxes	26,532.88
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Adjusted net income	\$217,291.45
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Petition

Less:

Exemption 20%	\$43,458.29
Dividends paid	75,982.91

119,441.20

Undistributed adjusted net income	\$ 97,850.25
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Surtax 30%	\$ 29,355.07
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Surtax previously assessed	None
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Deficiency of surtax	\$ 29,355.07
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Add:

25% of the tax as an addition for failure to file a return of personal holding company, form 1120H	7,338.77
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Deficiency of surtax and penalty	\$ 36,693.84
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1936

Adjustment to Net Income

Net income shown in revenue agent's report dated January 3, 1938, to which you have agreed, and which report is made a part of this letter	\$171,362.02
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Net income, adjusted	\$171,362.02
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Explanation of Adjustment

No change has been made in the net income as previously determined.

Computation of Tax

Excess-Profits Tax

Taxable net income	\$171,362.02
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Less:

10% of \$2,000,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1936	200,000.00
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Net income subject to excess-profits tax	None
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Petition

Excess-profits tax assessed:

Original, account #403018

None

Deficiency in excess-profits tax

None

Income Tax

Normal Tax:

Taxable net income

\$171,362.02

Less:

Excess-profits tax

None

Net income for normal tax computation

\$171,362.02

8% of \$2,000.00

\$ 160.00

11% of \$13,000.00

1,430.00

13% of \$25,000.00

3,250.00

15% of \$131,362.02

19,704.30

Total normal tax

\$ 24,544.30

Surtax on Undistributed Profits:

Taxable net income

\$171,362.02

Less:

Normal tax

24,544.30

Adjusted net income

\$146,817.72

Less:

Dividends paid credit

93,532.19

Undistributed net income

\$ 53,285.53

Amount subject to surtax

\$ 53,285.53

7% of \$14,681.77

\$ 1,027.72

12% of \$14,681.77

1,761.81

17% of \$23,921.99

4,066.74

Amount of tax

\$ 6,856.27

Petition

Total surtax	\$ 6,856.27
Normal tax	24,544.30

Total income tax (normal tax and surtax)	\$ 31,400.57
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Income tax assessed (normal tax and surtax):

Original, account #403018 \$27,362.85

Additional, February 1938 list,
account #520073 4,037.72

Total assessed	31,400.57
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Deficiency of income tax	None
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Computation of Surtax under section 351

Net income	\$171,362.02
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Less:

Federal income, war profits and excess- profits ^a taxes	\$4,085.89
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Adjusted net income	\$137,276.13
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Less:

Exemption 20%	\$27,455.23
Dividends paid credit	93,532.19

120,987.42

Undistributed adjusted net income	\$ 16,288.71
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Amount taxable at 8% — \$2,000.00	\$ 160.00
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Amount taxable at 18% — \$14,288.71	2,571.97
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Total surtax	\$ 2,731.97
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Surtax previously assessed	None
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Deficiency in surtax	\$ 2,731.97
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Add:

25% of tax as an addition for failure to file personal holding company, form 1120H	682.99
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Deficiency of surtax and penalty	\$ 3,414.96
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Petition

EXHIBIT "B"

Pl-1c

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

IT:A:4

GPS

Mar 14 1938

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Sirs:

A review of the report submitted by the internal revenue agent in charge, 341 Ninth Avenue, New York, New York, covering your tax liability for the taxable years ended December 31, 1934 and 1935, discloses a deficiency in surtax of \$45,254.22 and a 25% penalty of \$11,313.55, as set forth in the statement attached.

If you agree to the determination of your tax liability, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:A:4:GPS. The signing of this form will permit a prompt assessment of the deficiency and thus prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier. IF THIS FORM IS NOT EXECUTED AND FILED, INTEREST AT THE RATE OF 6 PER CENT PER ANNUM WILL ACCUMULATE.

It will be appreciated if you will make a reply to this letter within fifteen days from the date thereof by returning the enclosed form properly executed or by the submission

Petition

sion of a protest in accordance with the instructions contained in the accompanying statement.

Respectfully,

JOHN R. KIRK
Deputy Commissioner.

Enclosures:

Form 870
Statement

STATEMENT

IT:A:4
GPS

R. Simpson & Co., Inc.,
143 West 42nd Street,
New York, New York.

Tax Liability for Taxable Years Ended
December 31, 1934 and 1935

Surtax (Section 351)

	<i>Liability</i>	<i>Assessed</i>	<i>Deficiency</i>	<i>Penalty</i>
1934	\$17,710.57	None	\$17,710.57	\$ 4,427.64
1935	27,543.65	None	27,543.65	6,885.91
Totals	\$45,254.22	None	\$45,254.22	\$11,313.55

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated February 29, 1936, copy of which has been furnished you, and which report is made a part hereof; to your protest dated April 1, 1936; and to the statements made at the conference held on May 22, 1936.

Petition

Inasmuch as you failed to file personal holding company returns, forms 1120H, within the time prescribed by law, twenty-five per centum of the tax has been added thereto in accordance with the provisions of section 291 of the Revenue Act of 1934, and section 406 of the Revenue Act of 1935.

Since more than eighty percent. of your gross income for the taxable years ended December 31, 1934 and December 31, 1935 is derived from interest and dividends and since more than fifty per cent. of the capital stock is owned by less than five stockholders, as specified in section 351(b)(1)(A) and (B)(C)(D) and (E), it is held that your corporation qualifies as a personal holding company, and is subject to taxation imposed at the rates set forth in section 351(a) of the Revenue Act of 1934.

Adjustments to Net Income

1934

Net income shown in revenue agent's report dated February 29, 1936, copy of which has been furnished you and to which you have agreed	\$203,727.87
Net income adjusted	\$203,727.87

Explanation of Adjustments

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted	\$203,727.87
Income tax at 13 $\frac{3}{4}$ %	\$ 28,012.58
Total tax liability	\$ 28,012.58

Petition

Income tax assessed:

Original, account #400055.....	\$26,900.06	
Additional, July, 520049 — 1936 list	1,112.52	
Total assessed	\$28,012.58	28,012.58

Deficiency of income tax \$ None

Computation of Surtax under Section 351

Net income \$203,727.87

Less:

Federal income, war profits, and excess-
profits taxes 28,012.58

Adjusted net income \$175,715.29

Exemption—20% \$35,143.06

Dividends paid during year 81,537.00 116,680.06

Undistributed adjusted net income \$ 59,035.23

Surtax 30% \$ 17,710.57

Surtax previously assessed None

Deficiency of surtax \$ 17,710.57

Add:

25% of the tax as an addition for failure to
file a return of Personal Holding Com-
pany, form 1120H 4,427.64

Total surtax and penalty \$ 22,138.21

Petition

1935

Adjustments to Net Income

1935

Net income shown in revenue agent's report dated February 26, 1937, copy of which has been furnished you and to which you have agreed	\$243,824.33
Net income adjusted	\$243,824.33

Explanation of Adjustments

No change has been made in the net income as previously determined.

Computation of Tax

Income Tax under section 13 of Revenue Act of 1934

Net income adjusted	\$243,824.33
Income tax at 13 $\frac{3}{4}$ %	\$ 33,525.85
Total tax liability	\$ 33,525.85

Income tax assessed:

Original, account #400011	\$32,713.97
Additional, April 520065, 1937	
List	811.88

Total assessed	33,525.85
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Deficiency in income tax	\$ None
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Excess-Profits Tax

Net income for excess-profits tax computation	\$243,824.33
Less: 12 $\frac{1}{2}$ % of \$1,861,853.52, adjusted declared value of capital stock	232,731.69
Amount subject to excess-profits tax	\$ 11,092.64
Excess-profits tax at 5%	\$ 554.63

Petition

Excess-profits tax assessed:

Original, account #400011	\$259.40
Additional, April 520065—1937 list	295.23

Total assessed	554.63
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Deficiency in excess-profits tax	\$ None
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Computation of Surtax under section 351

Net income	\$243,824.33
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Less: Federal income, war-profits, and excess-profits taxes	34,080.48
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Adjusted net income	\$209,743.85
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Adjusted net income	\$209,743.85
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Exemption 20%	\$41,948.77
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Dividends paid	75,982.91	117,931.68
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Undistributed adjusted net income	\$ 91,812.17
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Surtax 30%	\$27,543.65
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Surtax previously assessed	None
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Deficiency of surtax	\$27,543.65
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Add:

25% of the tax as an addition for failure to file a return of Personal Holding Co., form 1120H	6,885.91
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Total surtax and penalty	\$34,429.56
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Answer.**UNITED STATES BOARD OF TAX APPEALS****R. SIMPSON & Co., Inc.,***Petitioner,**v.***COMMISSIONER OF INTERNAL REVENUE,***Respondent.*DOCKET No.
98208.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations contained in the first sentence of paragraph 1 of the petition but denies all other allegations contained in said paragraph.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4 (a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5 (a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

5 (b) to (j), both inclusive. Denies the allegations contained in subparagraphs (b) to (j), both inclusive of paragraph 5 of the petition.

Answer

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted qualified or denied.

WHEREFORE, it is prayed that the determination of the respondent be in all things approved.

J. P. WENCHEL
ECA

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

E. O. HANSON,
Division Counsel.

CONWAY N. KITCHEN,
Special Attorney,
Bureau of Internal Revenue.

Findings of Fact and Opinion.

UNITED STATES BOARD OF TAX APPEALS

R. SIMPSON & Co., INC., PETITIONER, *v.* COMMISSIONER OF
INTERNAL REVENUE, RESPONDENT.

Docket No. 98208. Promulgated May 14, 1941.

1. Corporation actively engaged in the business of pawnbroker, and more than 50 percent of the stock of which was owned by less than 5 individuals, *held* to be a personal holding company within meaning of Revenue Acts of 1934 and 1936, section 351. *Noteman v. Welch*, 108 Fed. (2d) 206, followed.

2. Failure to file personal holding company returns *held* to justify imposition of penalties.

Gerald Donovan, Esq., for the petitioner.

Conway Kitchen, Esq., for the respondent.

Respondent determined deficiencies in petitioner's surtax liability and added 25 percent penalties for failure to file personal holding company returns as follows:

<i>Year</i>	<i>Deficiency</i>	<i>Penalty</i>
1934	\$19,563.02	\$4,890.76
1935	29,355.04	7,338.77
1936	2,731.97	682.99

The full amounts of the deficiencies and penalties are in issue in this proceeding. The questions presented are whether petitioner, engaged in business as a pawnbroker, is a personal holding company within the meaning of section 351 of the Revenue Acts of 1934 and 1936, and, if so, whether it is liable for the penalties proposed to be assessed for failure to file personal holding company returns.

Findings of Fact and Opinion .

FINDINGS OF FACT.

Petitioner was incorporated under the laws of New York on July 1, 1918. During the taxable years it had two places of business, the principal one at 143 West 42d Street and the other on Broadway at the corner of 67th Street, both in the city of New York. It was qualified to conduct a general pawnbroking and loan business upon pledges of personal property, and was licensed to conduct such business by the Bureau of Licenses of New York City. Petitioner continued in corporate form a business that was established in 1827 and which had been conducted first by one Robert Simpson and then by his nephew, Thomas Simpson, father of the present head of the company. The incorporation was decided upon in 1918 when Thomas Simpson was getting along in years and his son was in the Army.

A summary of petitioner's activities during the taxable years is as follows:

	1934	1935	1936
Number of pledges issued	32,131	32,045	28,673
Amount loaned *	\$2,489,617.86	\$2,502,604.22	\$2,390,217.23
Number of pledges redeemed	28,543	29,118	28,138
Number of pledges booked for sale	7,452	8,561	8,192
Number of pledges sold	2,941	3,167	2,841
Gross income	\$428,437.49	\$469,386.95	\$410,576.81
Reported in Federal income tax returns as interest on loans, etc.	\$422,437.49	\$442,545.28	\$407,464.53

Findings of Fact and Opinion

Petitioner employs 12 appraisers at its 42d Street store and 4 appraisers at its 67th Street store. As a rule there are approximately twice as many applications for loans as there are loans actually made. The average rate of interest on the loans is between 15 and 17 percent. If the appraisal of jewelry and its safekeeping were not required and if compliance with the law and police regulations and the auctioning and the accounting for surplus moneys were not necessary, the rate of interest computed with respect to the same volume of business could be reduced by 30 percent.

Petitioner, during the taxable years, was actively engaged in the conduct of business with the general public in the operation of its pawn shops. It loaned money on personal property consisting almost entirely of jewelry. During the years 1934, 1935, and 1936 more than 50 percent of its capital stock was owned by less than five stockholders. More than 80 percent of its gross income for the taxable years was derived from interest.

On or before the due dates petitioner filed its complete income and excess profits tax returns, Form 1120, for the taxable years. The question asked on each return, whether the reporting corporation was a personal holding company within the meaning of section 351 of the applicable revenue acts, was answered in the negative. The form of return for each of the three years advised the taxpayer that if it was a personal holding company the filing of an additional return on Form 1120-H was required. Petitioner also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over \$300 paid to its stockholders, for the years in question. Petitioner's books and records, which gave some indication that more than 50 percent of its stock was owned by less than five stockholders and disclosed that at least 80 percent of its income was

Findings of Fact and Opinion

derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years.

Petitioner did not file personal holding company returns, Form 1120-H, for the taxable years. Robert C. Simpson, who has been president of petitioner since 1932 and was its treasurer from 1922 until 1932 and who executed its income tax returns for the years in question, having personally prepared the returns for two of the years, was aware of the provisions of section 351 of the Revenue Acts of 1934 and 1936 and the requirements with respect to the filing of personal holding company returns. He did not file personal holding company returns on behalf of petitioner for the taxable years because he thought petitioner was not a personal holding company within the meaning of section 351.

During the years 1934, 1935, and 1936 petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts.

OPINION.

OPPER: Every argument advanced by petitioner in its principal brief save one was made and considered unfavorably in *Noteman v. Welch* (C. C. A., 1st Cir.), 108 Fed. (2d) 206. See also *Seaboard Small Loan Corporation*, 42 B. T. A. 715; *O'Sullivan Rubber Co.*, 42 B. T. A. 721. Efforts to distinguish the *Noteman* case in the reply brief on the basis of details of operation of a pawn shop as compared to a "personal finance company", even if borne out by the record or authority which they are not, must be unavailing as falling short of impeaching the underlying principle. We

Findings of Fact and Opinion

may consider that "the taxpayer makes out an appealing case, but mindful of the limits of our judicial function, we cannot save the taxpayer from an exaction which Congress required of it * * *." *Noteman v. Welch, supra*, 215.

Petitioner attacks the constitutionality of the section if applied to its situation, a question not expressly raised in the *Noteman* case on appeal. But see 26 Fed. Supp. 437, 442. We think, however, that it was inferentially disposed of. The contention is that the section 351 surtax would operate in an arbitrary and discriminatory fashion upon petitioner. In *Noteman v. Welch, supra*, 209, the Court quotes Congressional Committees to show "that the bill would work no real hardship upon any corporation except one that was being used to reduce the surtaxes of its stockholders, because the corporation can always escape this tax by distributing to its stockholders at least 90 percent of its adjusted net income." In the case of corporations having a handful of shareholders, a class to which the operation of the section is confined, such a distribution would scarcely cause the sort of significant burden requiring resort to the dignity and consequence of the Federal Constitution. And if corporations whose stock is more widely held are expressly omitted from the regulated group, the classification is for that very reason deprived of any discriminatory or arbitrary quality. The line may have been drawn unfortunately for petitioner, but wherever drawn someone could frustrate it if petitioner can here. Nor can it be a legitimate cause of complaint that Congress has chosen to make the section applicable to petitioner by the device of definition and characterization as a "holding company." While petitioner may not be a holding company for purposes of other statutes, it suffers no detriment by being called one here except such as would be equally severe if it were defined

Findings of Fact and Opinion

merely as a "taxpayer." Cf. *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85.

The penalty for failing to file a personal holding company return is mandatory for the years 1934 and 1935, since no return was ever filed. *Noteman v. Welch, supra*. By the time the 1936 return was due, the statute had been in effect for practically three years. Each corporation income tax form had asserted the necessity that petitioner file such a return if it were a personal holding company, and petitioner's failure to file was due entirely to its erroneous impression that it was not one. This can not be the reasonable cause required by the penalty section, *Low Pine Lawn Corporation*, 41 B. T. A. 638, and requires approval of respondent's imposition of the penalty, *Lane-Wells Co.*, 43 B. T. A. 463, without the necessity of passing upon petitioner's contention that under the wording of the 1936 Act a showing of reasonable cause entitled the taxpayer to a remission of the imposition in spite of the complete absence of even a delinquent filing.

Decision will be entered for the respondent.

Decision and Order.**UNITED STATES BOARD OF TAX APPEALS
WASHINGTON****R. SIMPSON & Co., Inc.,***Petitioner,**v.***COMMISSIONER OF INTERNAL REVENUE,***Respondent.*DOCKET No.
98208**DECISION**

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion, promulgated May 14, 1941, it is

ORDERED and DECIDED: That there are deficiencies in surtax liability and penalties, as follows:

<i>Year</i>	<i>Deficiency</i>	<i>Penalty</i>
1934	\$19,563.02	\$4,890.76
1935	29,355.07	7,338.77
1936	2,731.97	682.99

Entered May 20, 1941.

(s) CLARENCE V. OPPER,
Member.

(SEAL OF UNITED STATES
BOARD OF TAX APPEALS)

Stipulation of Venue.

UNITED STATES BOARD OF TAX APPEALS

<p>R. SIMPSON & Co., INC., <i>Petitioner,</i> <i>against</i> COMMISSIONER OF INTERNAL REVENUE, <i>Respondent.</i></p>	}	<p>B.T.A. DOCKET No. 98208.</p>
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STIPULATION AGREEING UPON VENUE ON PETITION TO REVIEW DECISION OF BOARD OF TAX APPEALS.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause, by their respective undersigned attorneys, that the decision of the United States Board of Tax Appeals in said cause may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

GERALD DONOVAN

Gerald Donovan

Attorney for Petitioner

No. 14 Wall Street,

New York City, New York.

SAMUEL O. CLARK, Jr.

Assistant Attorney General,

Attorney for Respondent.

Petition for Review.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

R. SIMPSON & Co., Inc.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

B.T.A. DOCKET
No. 98208.

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes R. Simpson & Co., Inc., by its attorney, Gerald Donovan and petitions the United States Circuit Court of Appeals for the Second Circuit for a review of the decision and order of the United States Board of Tax Appeals, rendered and entered on May 20, 1941, 44 B.T.A. 498, No. 80, in the cause numbered 98208 on the docket of said Board, wherein said R. Simpson & Co., Inc., was petitioner and the Commissioner of Internal Revenue was respondent, and, in support of its petition, respectfully shows this Honorable Court as follows:

I. Jurisdiction and Venue.

The petitioner, R. Simpson & Co., Inc., is a corporation duly organized and existing under and by virtue of the

Petition for Review

laws of the State of New York with its principal office in New York City, N. Y. The petitioner did not file personal holding company surtax returns for any of the taxable years, 1934, 1935 or 1936.

On or about the 14th day of August, 1941, the attorney for the petitioner and the attorney for the respondent, Commissioner of Internal Revenue, entered into a stipulation in writing whereby they designated the United States Circuit Court of Appeals for the Second Circuit as the appropriate court for review of the aforesaid decision of the United States Board of Tax Appeals.

II. Prior Proceedings.

The respondent Commissioner determined deficiencies in petitioner's personal holding company surtax liability and added twenty-five percent. penalties for failure to file personal holding company surtax returns as follows:

<i>Year.</i>	<i>Deficiency.</i>	<i>Penalty.</i>	<i>Total.</i>
1934	\$19,563.02	\$4,890.76	\$24,453.78
1935	29,355.07	7,338.77	36,693.84
1936	2,731.97	682.99	3,414.96
	<hr/> \$51,650.06 *	<hr/> \$12,912.52	<hr/> \$64,562.58

Thereafter petitioner filed its appeal from the notice of deficiency with the United States Board of Tax Appeals. The hearing of said appeal by the said Board was held on December 9, 10 and 13, 1940. On May 14, 1941, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeal, and on May 20, 1941, the Board rendered its decision and entered its final order of redetermination in said appeal, wherein and whereby it decided and ordered that there were deficiencies and penalties for the taxable years as above set forth.

Petition for Review

III. Nature of the Controversy.

The principal questions, presented by the record and this petition for review, are whether, during the taxable years in question, the petitioner, a corporation found by the Board to have been "actively engaged in the conduct of business with the general public in the operation of its pawn shops", was a personal holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936 or either of said acts; and in the event that petitioner is held to be a personal holding company within the meaning of both or either of said acts, whether the application of said statutes, or either of them, to petitioner is constitutional under the organic law of the United States of America; and whether said statutes, or either of them, as applied to petitioner are constitutional under the organic law of the United States of America.

IV. Designation of Court of Review.

The said petitioner, being aggrieved by the said findings of fact and conclusions of law, contained in the said findings and opinion of the Board, and by its decision and final order, rendered and entered thereon, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

V. Assignment of Errors.

The petitioner alleges that, in the record and proceedings before the United States Board of Tax Appeals and in the decision and final order of redetermination, rendered and entered by the Board, manifest errors occurred and intervened to the prejudice of the petitioner, as follows:

1. The Board erred in concluding that, during the year 1934, petitioner was a personal holding company within the

Petition for Review

meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not concluding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

2. The Board erred in concluding that, during the year 1935, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not concluding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

3. The Board erred in concluding that, during the year 1936, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not concluding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

4. The Board erred in concluding, as to the petitioner, that more than eighty percent. of its gross income for the taxable years was derived from interest, and further erred in not concluding that less than eighty percent. of its gross income for the taxable years was derived from interest, royalties, dividends, annuities and gains from the sale of stock or securities.

5. The Board erred in concluding that the average rate of interest on the loans is between 15 and 17 percent. and further erred in not concluding that the average rate of interest on the loans was less than 12 percent.

6. The Board erred in concluding that petitioner's books and records disclosed that at least eighty percent. of its income was derived from interest, and further erred in not concluding that petitioner's books and records dis-

Petition for Review

closed that less than eighty percent. of its income was derived from interest.

7. The Board erred in concluding that at least eighty percent. of petitioner's income, during the years in question or any one of them, was derived from interest, and further erred in not concluding that less than eighty percent. of petitioner's income during the years in question, or any one of them, was derived from interest.

8. The Board erred in concluding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1934, and further erred in not concluding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1934.

9. The Board erred in concluding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1935, and further erred in not concluding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1935.

10. The Board erred in concluding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1936, and further erred in not concluding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1936.

11. The Board erred in holding that, during the year 1934, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not holding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

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12. The Board erred in holding that, during the year 1935, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not holding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

13. The Board erred in holding that, during the year 1936, petitioner was a personal holding company within the meaning of section 351 of the applicable revenue acts, or of any applicable revenue act, and further erred in not holding that petitioner was not a personal holding company within the meaning of any applicable revenue act.

14. The Board erred in holding, as to the petitioner, that more than eighty percent. of its gross income for the taxable years was derived from interest, and further erred in not holding that less than eighty percent. of its gross income for the taxable years was derived from interest, royalties, dividends, annuities and gains from the sale of stock or securities.

15. The Board erred in holding that the average rate of interest on the loans is between 15 and 17 percent. and further erred in not holding that the average rate of interest on the loans was less than 12 percent.

16. The Board erred in holding that petitioner's books and records disclosed that at least eighty percent. of its income was derived from interest, and further erred in not holding that petitioner's books and records disclosed that less than eighty percent. of its income was derived from interest.

17. The Board erred in holding that at least eighty percent. of petitioner's income, during the years in question or any one of them, was derived from interest, and further

Petition for Review

erred in not holding that less than eighty percent. of petitioner's income during the years in question, or any one of them, was derived from interest.

18. The Board erred in holding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1934, and further erred in not holding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1934.

19. The Board erred in holding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1935, and further erred in not holding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1935.

20. The Board erred in holding that petitioner did not show reasonable cause for failure to file a personal holding company surtax return for the year 1936, and further erred in not holding that petitioner did show reasonable cause for failure to file a personal holding company surtax return for the year 1936.

21. The Board erred in holding, deciding and ordering that there was any deficiency in personal holding company surtax liability for the taxable year 1934 and, specifically, that there was a deficiency of \$19,563.02, and further erred in not holding, deciding and ordering that there was no deficiency for that year.

22. The Board erred in holding, deciding and ordering that there was any deficiency in personal holding company surtax liability for the taxable year 1935 and, specifically, that there was a deficiency of \$29,355.07, and further erred

Petition for Review

in not holding, deciding and ordering that there was no deficiency for that year.

23. The Board erred in holding, deciding and ordering that there was any deficiency in personal holding company surtax liability for the taxable year 1936 and, specifically, that there was a deficiency of \$2,731.97, and further erred in not holding, deciding and ordering that there was no deficiency for that year.

24. The Board erred in holding that there are found here most of the essential features of a personal holding company as prescribed in the cases cited in its opinion, and further erred in not holding that there are found here few or none of the essential features of a personal holding company as prescribed in the cases cited in its opinion or elsewhere in the decisional, statutory or organic law.

25. The Board erred in holding, deciding and ordering that there was any penalty for the taxable year 1934, and, specifically, that there was a penalty of \$4,890.76, and further erred in not holding, deciding and ordering that there was no penalty for that year.

26. The Board erred in holding, deciding and ordering that there was any penalty for the taxable year 1935, and specifically, that there was a penalty of \$7,338.77, and further erred in not holding, deciding and ordering that there was no penalty for that year.

27. The Board erred in holding, deciding and ordering that there was any penalty for the taxable year 1936, and, specifically, that there was a penalty of \$682.99, and further erred in not holding, deciding and ordering that there was no deficiency for that year.

Petition for Review

28. The Board erred in holding that the application to petitioner of the personal holding company surtax provisions of the Revenue Acts of 1934 and 1936, or either of said acts, was constitutional, and not arbitrary and discriminatory, did not deny petitioner the equal protection of the law and did not constitute the taking of petitioner's property without due process of law, and further erred in not holding that the application to petitioner of the personal holding company surtax provisions of the Revenue Acts of 1934 and 1936, or either of said acts, would be unconstitutional, arbitrary and discriminatory, would deny petitioner the equal protection of the law and would constitute the taking of petitioner's property without due process of law.

29. The Board erred in holding that the personal holding company surtax provisions of the Revenue Act of 1934 and 1936, as applied to petitioner, are constitutional, are not arbitrary and discriminatory, do not deny petitioner the equal protection of the law, and do not take petitioner's property without due process of law, and further erred in not holding that the personal holding company surtax provisions of the Revenue Acts of 1934 and 1936, as applied to petitioner, are unconstitutional, arbitrary and discriminatory, deny petitioner the equal protection of the law and take petitioner's property without due process of law.

30. The Board erred in rendering and ordering decision for the respondent and further erred in not rendering and ordering decision for the petitioner.

WHEREFORE, your petitioner prays that this Honorable Court review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same; that a transcript of the record be prepared in accordance

Petition for Review

with law and with the rules of this Honorable Court, and transmitted to the Clerk thereof for filing; that appropriate action be taken to the end that the errors complained of may be reversed and corrected by this Honorable Court and the entry of a decision by the Board be directed in favor of the petitioner determining that there are no deficiencies in personal holding company surtaxes and no penalties for failure to file personal holding company surtax returns; and for the entry of such further orders and directions as shall by this Honorable Court be deemed meet and proper and in accordance with law..

(Sgd.) Gerald Donovan

GERALD DONOVAN

Attorney for Petitioner,

No. 14 Wall Street,

New York City, N. Y.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GERALD DONOVAN, being duly sworn, deposes and says:

I am the attorney for the petitioner in the above-entitled proceeding, and, as such I am duly authorized to verify the foregoing petition for review. I have read the said petition and am familiar with the statements contained therein. The statements therein made are true to the best of my knowledge, information and belief.

(Sgd.) GERALD DONOVAN

Subscribed and Sworn to before me)
this 15th day of August, 1941,)

(Sgd) ERNEST L. WEILER

Notary Public

My Commission expires March 30th, 1943.

[NOTARIAL SEAL]

Proof of Service.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

R. SIMPSON & Co., Inc.,

*Petitioner,**against*

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

B. T. A.

DOCKET NO.

98208.

NOTICE OF FILING OF PETITION FOR REVIEW OF DECISION
OF THE UNITED STATES BOARD OF TAX APPEALS.

To:

COMMISSIONER OF INTERNAL REVENUE,

Internal Revenue Building,

Washington, D. C.

JOHN P. WENDELL, Esq., Attorney for Respondent,

Chief Counsel for the Bureau of Internal Revenue,

Internal Revenue Building,

Washington, D. C.

PLEASE TAKE NOTICE, that on August 18, 1941, the undersigned presented to the United States Board of Tax Appeals and filed with the Clerk thereof, the petition of R. Simpson & Co. Inc., for review by the United States Circuit Court of Appeals for the Second Circuit of the final order and decision of said Board in the cause referred to

Proof of Service

above. A copy of said petition, and of the assignment of errors is hereto attached and served upon you.

Dated, New York City, N. Y., August 15th, 1941.

(Sgd.) GERALD DONOVAN

Gerald Donovan

Attorney for Petitioner

Office and P. O. Address

No. 14 Wall Street,

New York City, N. Y.

Service of the foregoing notice of filing and of a copy of the petition for review and assignment of errors is hereby acknowledged this 18th day of August, 1941.

(Sgd.) J. P. WESCHEL

Chief Counsel,

Bureau of Internal Revenue,

Attorney for Respondent.

Praeceptum, with Proof of Service.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

R. SIMPSON & Co., Inc.,

Appellant-Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Appellee-Respondent.

B. T. A. DOCKET
No. 98208

PRAECEPT FOR RECORD

TO THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You are hereby requested to prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, in connection with the Petition for Review by said court, heretofore filed by the Petitioner in the above-entitled cause, a transcript duly certified as correct, of the record in the above-entitled cause, prepared as required by law and by the rules of said court, and to include in said transcript of record copies of the following matters, documents, and records, to wit:

(1) Docket Entries of all proceedings before the United States Board of Tax Appeals.

(2) All pleadings before the United States Board of Tax Appeals, including:

(a) Petition for Redetermination.

(b) Answer of the Respondent.

Præcipe, with Proof of Service

(3) Findings of Fact and Opinion of the United States Board of Tax Appeals.

(4) Order and Decision of the United States Board of Tax Appeals.

(5) Stipulation for Review by the United States Circuit Court of Appeals for the Second Circuit.

(6) Petition for Review and Assignments of Error.

(7) Notice to Respondent of Filing of Petition for Review and Assignments of Error, together with acknowledgment by respondent of service thereof and of a copy of the Petition for Review and Assignments of Error.

(8) This Præcipe for Record, together with acknowledgment by respondent of service thereof.

Gerald Donovan

GERALD DONOVAN,

Attorney for Petitioner,

No. 14 Wall Street,

New York City, N. Y.

Service of a copy of this Præcipe for Record is hereby admitted this 15th day of October, 1941.

J. P. WENCHEL,

Assistant Attorney-General,

Department of Justice,

Attorney for Respondent.

Clerk's Certificate.**UNITED STATES BOARD OF TAX APPEALS**

WASHINGTON

R. SIMPSON & Co., Inc.,

*Petitioner,**v.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*DOCKET NO.
98208**CERTIFICATE**

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 47, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 27th day of October, 1941.

B. D. GAMBLE,

Clerk,

United States Board of Tax Appeals.

[SEAL]

Order of Enlargement.

UNITED STATES BOARD OF TAX APPEALS

R. SIMPSON & Co., Inc., <i>Petitioner.</i>	DOCKET No. 98208
v. COMMISSIONER OF INTERNAL REVENUE, <i>Respondent.</i>	

ORDER ENLARGING TIME

For cause appearing of record, it is

ORDERED: That the time for transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the United States Circuit Court of Appeals, Second Circuit, be and it hereby is extended to November 8, 1941.

(Signed) C. R. ARUNDELL
Member

Dated: Wash. D. C.
Oct. 17, 1941.

lj

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1941

No. 147

(Argued May 19, 1942. Decided June 19, 1942)

R. SIMPSON & Co., Inc., Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent

On Petition to Review an Order of the Board of Tax
Appeals, Assessing a Deficiency in Income Tax Against
the Petitioner for the Years 1934, 1935 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit
Judges

Gerald Donovan for the petitioner.
Joseph M. Jones for the respondent.

PER CURIAM:

Affirmed as to the first point, on the authority of *Nateman v. Welch*, 108 Fed. (2d) 206 (C. C. A. 1); and as to the second, on the authority of *O'Sullivan Rubber Co. v. Commissioner*, 120 Fed. (2d) 845 (C. C. A. 2).

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT.

At a Stated Term of the United States Circuit Court of
Appeals, in and for the Second Circuit, held at the United
States Courthouse in the City of New York, on the 6th day
of July one thousand nine hundred and forty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand,
Hon. Harrie B. Chase, Circuit Judges.

R. SIMPSON & Co., Inc., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 51] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. R. Simpson & Co., Inc., v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 6, 1942. D. E. Roberts, Clerk.

[fol. 52] UNITED STATES OF AMERICA; SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 51, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of R. Simpson & Co., Inc., Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fifth day of September, in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the said United States the one hundred and sixty-seventh.

D. E. Roberts, Clerk. (Seal.)

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—June 7, 1943

On Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit

A motion for leave to file a petition for rehearing and petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the motion for leave to file and petition for rehearing be, and the same are hereby, granted.

And it is further ordered that the order denying certiorari, be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, limited to the question presented by the second reason relied upon in the petition for writ of certiorari. In their briefs and on the oral argument, counsel are requested to discuss the question of the jurisdiction of this Court to grant a petition for rehearing in this case. Cf. *Helvering v. Northern Coal Co.*, 293 U. S. 191, section 1140 of the Internal Revenue Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 7, 1943.

Mr. Justice Rutledge took no part in the consideration or decision of this application.